Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEONARD PELTIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

AMICUS BRIEF FOR THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS BRIEF ON BEHALF OF
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
AND
CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE
By: JUDD C. IVERSEN
Attorney at Law, P.C.
1231 Market Street
Penthouse
San Francisco, CA
94103-1488
(415) 552-6500
Attorney for Amicus Curiae

TABLE OF CONTENTS

	Page
INTERESTS OF AMICUS CURIAE	1
I. INTRODUCTION	2
II. THE CONFLICT BETWEEN THE SUPREME COURT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DECISIONS RELATING TO PROSECUTORIAL NONDISCLOSURE OF EXCULPATORY EVIDENCE REQUIRES RESOLUTION BY THIS COURT	3
A. REMOVAL OF THE FOX FROM THE EVIDENTIAL HENHOUSE	3
B. THE TWO SOLUTIONS	5
1. Open File Discovery	6
2. The In Camera Hearing Solution	6
III. THE DILEMMA	8
CONCLUSION	13
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES — PAGE

Alford v. *United States* 282 U.S. 686 (1930) 10n.29
Bagley v. *Lumpkin* 789 F.2d 1297 (9th Cir. (1986) 4n.14
Brady v. *Maryland* 373 U.S. 83, 83 S.Ct. 1194 (1963) 1n.1,4n.10
Brookhart v. *Janis* 384 U.S. 1 (1965) 10n.29
Carillo v. *Perkins* 723 F.2d 1165 (5th Cir. 1984) 10n.29
Connally v. *Georgiam* 429 U.S. 245 ..... 6n.22
Coolidge v. *New Hampshire* 403 U.S. 443 (1971) 6n.22
Davis v. *Alaska* 415 U.S. 308 (1974) 10n.29,11
Douglas v. *Alabama* 380 U.S. 414 (1964) 10n.29
Geders v. *United States* 425 U.S. 80, 96 S.Ct. 1330 (1976) 10n.30
Gigilio v. *United States* 405 U.S. 150 (1972) 2n.3
Green v. *Wainwright* 634 F.2d 272 (5th Cir. (1981) 10n.29
Herring v. *New York* 422 U.S. 853 (1978) 10n.30
Hoover v. *State of Maryland* 714 F.2d 301 (4th Cir. 1983) 10n.29
House v. *Balkon* 725 F.2d 608 (11th Cir. 1984) 11
In Re Gault 387 U.S. 2021 (1967) 3n.7
Jencks v. *United States* 353 U.S. 657 (1957) 10n.29
Johnson v. *United States* 333 U.S. 10 (1948) 6n.22
Lo Ji Sales v. *New York* 442 U.S. 319 (1979) 6n.22
Pointer v. *Texas* 380 U.S. 400 (1964) 10n.29
Ray v. *United States* 588 F.2d 601 (8th Cir. 1978) 2n.3
Smith v. *Illinois* 390 U.S. 128 (1967) 10n.29
Strickland v. *Washington* __ U.S. __, 104 S.Ct. 2052 (1984) 10n.30
United States v. *Agurs* 427 U.S. 97, 96 S.Ct. 2392 (1976) 4n.11,7n.23,7n.26,12n.34
United States v. *Bagley* 473 U.S. __, 87 L.Ed.2d 481 105 S.Ct. 3375 (1985) 1n.1,4n.12,4n.13,5n.18,9n.28,10n.30,11n.33
United States v. *Bryant* 439 F.2d 642 (D.C. Cir 1971) 2n.3
United States v. *Cronic* 466 U.S. 648, 104 S.Ct. 2039 (1984) 10n.30
United States v. *Dennis* 384 U.S. 855 (1966) 12
United States v. *Higgs* 713 F.2d 39 (3rd Cir. 1983) 7n.23
United States v. *Lindstrom* 698 F.2d 1154 (11th Cir. 1983) 10n.29
United States v. *Nixon* 418 U.S. 683 (1974) 3n.5,9n.27
United States v. *Oxman* 740 F.2d 1298 (3rd Cir. 1984) 12n.35
United States v. *Peltier* 585 F.2d 314 (8th Cir. 1978) 2n.2,2n.3
United States v. *Toscanino* 500 F.2d 267 (2nd Cir. 1974) 3n.5
United States ex rel. Williams v. *Twomey* 510 F.2d 634 (7th Cir. 1976) 11
United States v. *Valenzala-Bernal* 458 U.S. 858 (1982) 10

No. 86-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEONARD PELTIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

AMICUS BRIEF FOR THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation. The membership are in daily contact with the criminal justice systems as advocates, law professors, and judges of the state and federal courts.

The California Attorneys for Criminal Justice (CACJ) is a state-wide organization whose attorneys' practices emphasize the defense of individuals accused of crime.

It is the position of the NACDL and CACJ that the Fifth Amendment, Sixth Amendment, Fourteenth Amendment and case law[1] mandate a new trial when the prosecution wrongfully withholds evidence subject to the Jencks Act and *Brady* discovery rules, which, if properly disclosed, would have raised a

[1] *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *United States* v. *Bagley*, 473 U.S. _____, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985).

reasonable doubt at trial as to the Defendant's guilt. Further, this Court's intercession is required to address the problems inherent in the prosecution being charged with deciding the information to which a criminal defendant is entitled.

In the instant case, NACDL and CACJ posit that both the trial court and the appellate erred when they ruled that Petitioner was not entitled to a reversal. We request this Court to grant the Petition for Certiorari and review the findings of the courts below.

I.

INTRODUCTION

The prosecution of Leonard Peltier began in a lie.[2] The totalitarian tactics surrounding the circumstances of Peltiers's extradition from Canada were such as to "shock the conscience" of the reviewing court that ordered an evidentiary hearing.

The trial of Leonard Peltier was pock-marked by prosecutorial misrepresentation of the utmost gravity.[3] In open court, the prosecution represented that he had no further exculpatory information when, in fact, "critical evidence" supporting the defense theory, was not disclosed.[4] At the hearing ordered by the appellate court, cross-examination of the crucial Government witness necessitated a recantation of perjury by that witness.

NACDL and CACJ firmly believe that besides the clear violations of the Fifth, Sixth, and Fourteenth Amendments briefed below, this Court must also sensitively consider the issue

---

[2] Motion to Vacate Judgment and for a New Trial, April 16, 1982, at page 46; Affidavit reprinted at Appendix 613 to 620 thereto. *See* also: *United States* v. *Peltier,* 585 F.2d 314, 332, 333 (8th Cir. 1978).

[3] Appellant's Opening Brief, July 24, 1985, p. 8. The prosecution is to be considered as one party. *See, Ray* v. *United States,* 588 F.2d 601, 603 (8th Cir. 1978); *United States* v. *Bryant,* 439 F.2d 642, 652 (D.C. Cir 1971); *Giglio* v. *United States,* 405 U.S. 150, 154 (1972). Therefore, whether the prosecutor himself had knowledge of falsehood is irrelevant. *See,* also A.B.A. Standards Relating to Prosecution Function and the Defense Function, March 1971, Rule 5.6, p.9 (conforming to DR7-103B of the Code of Responsibility).

[4] *United States* v. *Peltier, supra* at 329.

of the integrity of the proceedings which have been conducted heretofore. The appearance of a fair trial is as important as the correct result.[5]

The procedures designated by this Court to ensure a fair trial represent a fundamental commitment to the integrity of each individual's liberty. The constitutional and international implication[6] of the *Peltier* case go to the very heart of our law society. In the final analysis what demarcates our society from the totalitarian is the recognition that "due process is the primary and indispensable foundation of freedom."[7]

More than nineteen miles of geography separate "the last bastion of freedom on this earth" from Russian territory and legal method. If this Court follows the example of Lord Nelson when he put his blind eye to the telescope during the Battle of Copenhagen so that he would not receive the signal to disengage and ignores the totality of the effect of the withheld information in this case, then that distance will no longer separate us, but will be reduced to a single step from the legal procedure and police methods of the Gulag Archipelago.[8]

II.

THE CONFLICT BETWEEN THE SUPREME COURT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DECISIONS RELATING TO PROSECUTORIAL NON-DISCLOSURE OF EXCULPATORY EVIDENCE REQUIRES RESOLUTION BY THIS COURT

A. REMOVAL OF THE FOX FROM THE EVIDENTIAL HENHOUSE

The march of history and American law has been toward very generous discovery by defendants in criminal proceedings. [9]

---

[5] *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *see*, also: *United States* v. *Toscanino*, 500 F.2d 267 (2nd Cir. 1974).

[6] Privetera, *Toward a Remedy for International Extradition by Fraud: The Case of Leonard Peltier*, 2 Yale Law and Policy Rev. 49 (1983).

[7] Justice Fortas, *In re Gault*, 387 U.S. 2021 (1967).

[8] *See*, generally, Alexander Solshenitzen, *Gulag Archipelago*.

[9] See Appendix.

Under current standards, as set forth in *Brady*,[10] *Agurs*,[11] and *Bagley*,[12] the prosecutor is charged with the determining what information is to be revealed to the defendant. This high Court's recent opinion in *Bagley* requires reviewing courts to independently reassess the totality of the circumstances and record.[13] In so doing, the courts should reassess the policies and wisdom of allowing the prosecution such an authoritative role.[14]

In *Brady*, the Supreme Court attempted to lessen the disparity in access to exculpatory evidence before and during trial.

> Although the spirit of *Brady* was expansive as to equality of access effectuation of such access has been problematic. The two major problems of implementing the *Brady* right are that: the prosecutor—an understandably biased party—is left to decide which information is in fact favorable to the defendant; and when a defendant is denied access to exculpatory evidence, he must rely on a speculative post-trial review to determine the effect such evidence would have had on his case.[15]
>
> The Court in *Brady* held that the defendant was entitled to a new trial on due process grounds if the prosecutor had suppressed "material" evidence, thus implying that a new trial is not automatically required whenever the prosecutor suppresses exculpatory evidence. The Court did not define when suppressed exculpatory evidence would be deemed material, *but the problem left by Brady is not merely the*

---

[10] *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

[11] *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

[12] *United States* v. *Bagley*, 473 U.S. _____, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985).

[13] 105 S.Ct. 3384; 85 D.A.R. at 2430.

[14] On remand to the United States Court of Appeals for the Ninth Circuit, the court found that Bagley was deprived of a fair trial because of the Government's failure to disclose contracts signed by Government witnesses which would have impeached them by exposing their bias. *Bagley* v. *Lumkin*, 789 F.2d 1297, 1302 (9th Cir. 1986). In so doing, the court applied an objective standard of review to determine how the nondisclosed evidence might have affected the outcome of the trial.

[15] Capra, *Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 50 Fordham Law Review 391, 394 (1984).

> *definition of materiality. A more important problem is that whatever the standard of materiality, it is applied after the trial is over.*[16]
>
> . . . In the years since *Brady,* the problems of inadequate pre-trial review of exculpatory evidence and speculative post-trial review of the effect of non-disclosure have been exacerbated. In *Agurs,* the Court tacitly recognized the difficult position of the prosecutor after *Brady:* Because of his role as an advocate, the prosecutor cannot determine the favorability of evidence in the way that an independent factfinder (not to speak of defense counsel) would.[17]

Denial of access to such evidence is clearly contrary to *Brady's* spirit of disclosure; that a defendant is entitled to access to *all* evidence in his favor. Yet, this cannot be fully effectuated by a system of retrospective review adopted by *Agurs. Bagley* similarly engages the necessity of retrospective review. Therefore, the above analysis applies with equal force in its wake.[18]

B. THE TWO SOLUTIONS

The ultimate irony of the above-described crisis lies in the fact that decisions relating to the duty of prosecutorial disclosure conflict with and impinge upon other constitutional principles: truth in criminal proceedings; right to a trial by jury; right to effectively confront adverse witnesses and the right to effective assistance of counsel. Grave consequences follow when truth becomes the unwanted orphan of law.

The Amici and the nearly unanimous opinion of American scholarship argue for return to the first principle. An individual's liberty should no longer depend on blind chance, prosecutorial role schizophrenia and appellate usurpation of the role of the trier of fact. We, therefore, commend to the Court's consideration the alternatives of truth.

---

[16] Capra, *supra* at 396. *See,* Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 Iowa Law Review, 433 (1973) (for analysis of variance among standards applied in wake of *Brady).*

[17] Capra, *supra* at 396-397.

[18] *United States* v. *Bagley,* 473 U.S. _____, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985).

1. Open File Discovery

The first solution proposed to resolve the problems of bias, speculation and usurpation is to compel the prosecution to open its files to the defense.[19] The primary objection raised against this solution is that the information provided will be misused for the purpose of enabling the defendant to prepare perjured testimony or to intimidate potential prosecution witnesses.

Professor Wigmore has rendered the most cogent argument against these concerns.

> The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair chance of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one time refusal of the criminal law to allow the accused to produce any witnesses at all.

The objection, *a priori* has dubious merit. A fortiori, jurisdictions experimenting with expansive discovery further erodes its residual value.[20] Finally, to the extent open file discovery presents such problems whenever a court finds there is probable cause to believe a defendant should not be trusted with such evidence, the court may issue a protective order to make an exception to the general principle of discovery with regard to that evidence only. A viable exception may also be crafted to except prosecutorial work product.[21] Denial of all discovery would, therefore, be unnecessary.

2. The In Camera Hearing Solution

This Court has recognized the need for an independent, unbiased adjudication to protect citizen's fundamental Fourth Amendment rights.[22] A similarly objective factfinder should, as

---

[19] Nakell, *Discovery for the Defense—Developing Constitutional Considerations*, 50 North Carolina Law Review 444, 445 (1972).

[20] Langrock, *Vermont's Experience in Criminal Discovery*, 53 A.B.A. Journal 732 (1967); *see*, also: Miller, *The Omnibus Hearing-An Experience in Federal Criminal Discovery*, 5 San Diego Law Review, 293 (91968). Note also, Southern District of California's and District of Kansas' experience with same.

[21] Nakell, *supra* at 446.

[22] *Johnson* v. *United States*, 333 U.S. 10, 14 (1948); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Connally* v. *Georgiam* 429 U.S. 245; *Lo Ji Sales* v. *New York*, 442 U.S. 319 (1979).

an alternative to open file discovery, be employed to protect an accused's fundamental right of access to exculpatory evidence.

> The Fifth and Sixth Amendment rights to a fair trial are as important in the constitutional hierarchy as the Fourth Amendment's proscription against unreasonable searches and seizures. Yet, unlike the Fourth Amendment's guaranteed protection, the equally fundamental right of access to exculpatory evidence is in the hands of a naturally biased party—the prosecutor . . .
>
> *In camera* proceedings are currently employed on a limited basis. However, the fundamental *Brady* problem—that of forcing the prosecutor into a schizophrenic role—is not solved by a limited *in camera* right that can only be triggered by prosecutorial action.[23]
> The *Agurs* court . . . was most concerned with, and was specifically addressing *post-trial review* of the favorability of suppressed [evidence in light of finality of judgment considerations.[24]] . . .
>
> [Its] reasons do not apply [*before trial.*] There is no final judgment to be upset if evidence that is merely favorable and relevant to an accused is disclosed before a judgment is rendered. Moreover, it cannot be said that the point of an *in camera* hearing that merely favorable evidence would be useless to a defendant.[25]
>
> By eliminating the problem of prosecutorial incapability of determining whether evidence is favorable to the defendant by providing for neutral pretrial review and by adopting a pretrial disclosure standard of favorability and not materiality, the *in camera* solution assures that defendants will have much less cause to complain on appeal.[26]

The primary objection to adoption of a per se *in camera* hearing rule is that it might impose a heavy burden on the courts. It should be noted that appellate costs will be radically

---

[23] *Agurs* v. *United States,* 427 U.S. 97, 106 (1976); *United States* v. *Higgs,* 713 F.2d 39, 40, 44, 45 (3rd Cir. 1983). Cited in Capra at 395.

[24] Capra, *supra.*

[25] Capra, *supra* at 425-426.

[26] *Agurs* v. *United States, supra* at 98.

reduced, i.e., the costs of remand, multiple review and retrial will be avoided by its adoption.

The Amici believe either of the proposed alternatives would better guarantee truth and fairness in our criminal proceedings and that truth should be known and available to counsel, jury and defendant prior to the time of judgment.

III

THE DILEMMA

The unique factual circumstances of the *Peltier* case represent a perfect vehicle to reconcile tension and conflict between this Court's decisions relating to effective assistance of counsel, the right to confront adverse witnesses and an individual's right of access to exculpatory evidence. These three separate strains represent the primary principal of our system—finding the truth.

Because *Peltier* facts implicate all three principles of law and because in many instances a given set of facts may necessarily trigger application of more than one, a sound resolutional principle is required. Fortunately, *United States* v. *Nixon* provides such an analytical framework. In *Nixon*, a landmark criminal discovery decision, this Court balanced competing constitutional considerations, as should have been done in the instant proceedings.

> But this principle (executive privilege) must be considered in light of our historic commitment to the rule of law. This nowhere more profoundly manifest than in our view of the two-fold aim (of criminal justice) is that guilt shall not escape or innocence suffer. We have elected to employ an adversary system of criminal justice in which parties contest all issues before a court of law. THE NEED TO DEVELOP ALL RELEVANT FACTS IN THE ADVERSARY SYSTEM IS BOTH FUNDAMENTAL AND COMPREHENSIVE. THE ENDS OF CRIMINAL JUSTICE SYSTEM WOULD BE DEFEATED IF JUDG-

> MENTS WERE TO BE FOUNDED ON A PARTIAL OR SPECULATIVE PRESENTATION OF THE FACTS. THE VERY INTEGRITY OF THE JUDICIAL SYSTEM AND PUBLIC CONFIDENCE IN THE SYSTEM DEPEND ON FULL DISCLOSURE OF ALL FACTS, WITHIN THE FRAMEWORK OF THE RULES OF EVIDENCE. TO ENSURE THAT JUSTICE IS DONE, IT IS IMPERATIVE TO THE FUNCTION OF COURTS THAT COMPULSORY PROCESS BE AVAILABLE FOR THE PRODUCTION OF EVIDENCE NEEDED EITHER BY THE PROSECUTION OR BY THE DEFENSE. (Emphasis added.)
>
> It is the manifest duty of the courts to vindicate [the guarantees of the Fifth and Sixth Amendments] and to accomplish that it is essential that all relevant and admisible evidence be produced.[27]

That court recognized that absent the compelling considerations of national security and military import, the confidentiality of presidential communication must yield to the demands of fair administration of criminal justice. Thus, where constitutional considerations compete, the principle favoring greater discovery should always prevail.

The Amici ask this Court to answer a simple question: IF THE EXECUTIVE PRIVILEGE OF A PRESIDENT OF THE UNITED STATES MUST YIELD TO THE FIFTH AND SIXTH AMENDMENTS' PRINCIPLES OF TRUTH AND DUE PROCESS, ON WHAT BASIS MAY THE PROSECUTION, ABSENT A SHOWING OF JUSTIFICATION FOR NON-DISCLOSURE, BE EXEMPTED FROM THE COMMAND OF THOSE PRINCIPLES?

Under *Bagley*, supression of evidence violates due process and justifies a new trial, if there is a reasonable probability it would undermine confidence in the outcome.[28]

---

[27] *United States* v. *Nixon*, 418 U.S. 700, 701 (1974).

[28] *United States* v. *Bagley*, *supra* at 3385.

Under the cases construing an individual's right to confront adverse witnesses, minimal interference with the defendant's capacity to cross-examine justifies automatic reversal.[29]

Under the cases construing an accused's right to effective assistance of counsel, reasonable probability is again the standard to be applied but, "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing there has been a denial of Sixth Amendment rights which makes the adversary process itself presumptively unreliable."[30] *Bagley* differs in that regard making on face no exception to its principle.

Further conflict of standards is evidenced in *United States* v. *Valenzala Bernal*, 458 U.S. 858, 102 S.Ct. 3440 (1982) which, in what might loosely be called the area of constitutionally guaranteed access to evidence, is a leading case.

The *Valenzala* standard differs from the "reasonable probability" and "automatic reversal" standards in that a good faith determination is required by the party charged with evidentiary review that the witnesses possess no favorable evidence and further that only a "plausible explanation" of favorability is required of the movant.

The *Bagley* Court's recognition that impeachment evidence and exculpatory evidence are two sides of the same coin[31] should be construed as acknowledgment that the commands of the Fifth and Sixth Amendments apply with equal force where the undisclosed evidence would have effect of denying an individual the right of effective cross-examination.

---

[29] *Davis* v. *Alaska*, 415 U.S. 308, 318 (1973); *Alford* v. *United States*, 282 U.S. 681 (1931); *Douglas* v. *Alabama*, 380 U.S. 418, 419 (1964); *Pointer* v. *Texas*, 380 U.S. 400 (1964); *Brookhart* v. *Janis*, 384 U.S. 965. *See*, also *Jencks* v. *United States*, 353 U.S. 657, 667 (1956); *Hoover* v. *State of Maryland*, 714 F.2d 301 (4th Cir 1983); *Smith* v. *Illinois*, 390 U.S. 128 (1967); *Carrillo* v *Perkins*, 723 F.2d 1165 (5th Cir. 1984); *Greene* v. *Wainwright*, 634 F.2d 272 (5th Cir. 1981); *United States* v. *Lindstrom*, 698 F.2d 1154 (11th Cir. 1983).

[30] *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *United States* v. *Cronic*, 104 S.Ct. 2039, 2047 (1984). *See*, also, *Geders* v. *United States*, 425 U.S. 80, 96, 1330 (1976); *Herring* v. *New York*, 422 U.S. 853, 95 S.Ct. 2330.

[31] *United States* v. *Bagley*, *supra* at 3380.

In *Peltier,* seven specific violations of the Jencks Act placed such a direct restriction upon the ability to cross-examine Hodge upon the most critical evidence of guilt. The trial court's order of disclosure recognized the value of that evidence.[32] Therefore, the *Davis* standard is plainly applicable and required reversal in the instant context. By holding otherwise, the courts below sanctioned the power of a prosecutor to unfairly restrict defendant's cross-examination.

In *Bagley,* the minimal threshold of *Davis* v. *Alaska, supra,* requiring automatic reversal was not crossed because, there, non-disclosure did not involve any direct restriction on the scope of cross-examination. There, "primarily,"[33] the testimony of both witnesses was devoted to firearms charges of which the Respondent was acquitted. This differs from *Peltier* where the evidence excluded by prosecutorial non-disclosure directly impacted the right of confrontation and was totally compromised in a manner that the Respondent in *Bagley* was not.

The effective assistance of counsel cases are similarly applicable to the *Peltier* case. Intuitively, counsel cannot by definition be effective without all information vital to the conduct of the defense. The close nexus between non-disclosure and failure to investigate is amply illustrated by *House* v. *Balkom,* 725 F.2d 608 (11th Cir. 19890) where counsel's failure to uncover scientific tests (as in *Peltier*) was held grounds for reversal. The adversary system presupposes that "while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams* v. *Twomey,* 510 F.2d 634, 640 (7th Cir. 1976). In the *Peltier* case, counsel could not effectively impeach the prosecution's star witness because the prosecution would not allow counsel to have evidence of atomic impeachment value. "In an adversary system . . . it is rarely justifiable for the prosecutor to have exclusive access to a

---

[32] *See* App. 612 AOB, App. 614-615 AOB, App. AOB 630, App. AOB 635-636 AOB (1325-1326).

[33] *United States* v. *Bagley, supra* at 3376.

storehouse of relevant fact. Exceptions to this principle are justifiable only by the most compelling considerations." *United States* v. *Dennis,* 384 U.S. 855 (1966).

Where counsel in good faith, relies on a false open court statement that all exculpatory evidence has been disclosed, the adversary process has been rendered "presumptively unreliable" for Sixth Amendment purposes.[34] Said unreliability justifies reversal in the instant case.

In the *Peltier* case, unarmed at the evidentiary hearing with the FOIA information, counsel entered the ring of justice to fight a Goliath steeled with a multi-million dollar resources but the giant, despite his advantage, abandoned the inviolate precept of our system—the truth. So, he tried to vanquish David with the face of his power in suborning the perjury of Angie Long Visitor to extradite him from the land where he sought sanctuary and continued to foul the den of truth in pretrial discovery. When his disdain for truth was recognized by the appellate court, the giant instead of mending the error of his ways, again bore false witness against his neighbor at a hearing that had to be reconvened to allow him again to change his testimony.

The right to confront adverse witnesses, the right to effective assistance of counsel and the right to a trial by a jury are all rendered meaningless, if a prosecutor may unilaterally[35] decide what evidence will make a difference to the jury. The jury in the *Peltier* did not hear all of the evidence, even though the judge ordered disclosure of everything exculpatory. Peltier's constitutional right to a jury was even further annihilated by the conduct of the prosecutor. The *Brady* through *Bagley* requirements demand that every judge usurp the function of the trier of fact when assessing whether particular non-disclosure violated due process. The Sixth Amendment's command of a

---

[34] *See,* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* Vol. 34, Stanford Law Review (1982) for excellent argument as to justifications for a lenient standard of review of effective counsel in light of difficulties encountered by counsel in light of *Agurs. United States* v. *Agurs, supra.*

[35] *United States* v. *Oxman,* 740 F.2d 1298, 1311 (3rd Cir. 1984).

jury of twelve good men and true, therefore, conflicts with the current operation of due process principles.

The principle and framework of *Nixon* should control when constitutional principles contained in the Fifth, Sixth, and Fourteenth collide and greater discovery should be favored in order to arrive at the truth.

Effectuation of the removal of the fox from the evidential henhouse and restoration of the historical role of the jury, as trier of fact may be realized by application of the *Nixon* principle whenever conflict occurs and by the implementation of either an open file policy or an *in camera* review designed to elicit the fullest evocation of truth both before and during trial on an ongoing basis.

These solutions will guarantee better effectuation of Fifth, Sixth, and Fourteenth Amendment principles and policies including truth, due process, the appearance of integrity, equal protection, as well as promoting the finality of fair judgments. It will obviate the need for excessive post-trial speculation as to what effect evidence might have had had the jury properly seen the evidence. It will further fundamentally enhance the adversarial nature of our system by protecting the unarmed prisoner from the armed gladiator. The compelling considerations principle leaves room to craft exceptions where legitimate prosecutorial objectives would be promoted by non-disclosure.

And, finally, it will reduce the workload of a sorely overworked judiciary by obviating the need for multiple appeals in cases such as the present.

CONCLUSION

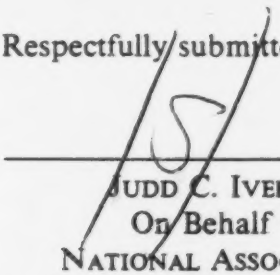
When various branches of the tree of our constitutional law grow so entangled as to endanger the life of the tree itself, history demands an answer, or at the very least, an experiment, a return to the first principles which gave the tree life.

The *Peltier* case is a vehicle for that return. The honorable judges and justices who guide the vehicle without timidity toward fairness stand on the shoulders of the giants of our jurisprudence.

Our society proceeds not from the errant assumption that what is collectively good for all is good for the one, but rather what is good for one, will be best for all. If our system of liberty is not merely to endure, but prevail, this Court must reach a decision which demands truth.

DATED: June 26, 1987.

Respectfully submitted,



JUDD C. IVERSEN
On Behalf Of
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE

APPENDIX

Babock, *Fairplay: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 Stanford L.Rev. 1133 (1982)

Capra, *Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review,* 50 Fordham Law Review 391 (1984)

Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 Iowa Law Rev. 433 (1973)

Langrock, *Vermont's Experience in Criminal Discovery,* 53 A.B.A. Journal 732 (1967)

Miller, *Discovery for the Defense—Developing Constitutional Considerations,* 50 N. Carolina Law Rev. (1972)

Privetera, *Toward a Remedy for International Extradition by Fraud: The Case of Leonard Peltier,* 2 Yale Law and Policy Rev. 49 (1983)

Solshenitzen, Alexander, *Gulag Archipelago*

CERTIFICATE OF SERVICE

I declare that I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled cause; my business address is 1231 Market Street, Penthouse, San Francisco, California 94103-1488. On June 29, 1987, I served the attached AMICUS BRIEF FOR THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

WILLIAM KUNSTLER, ESQ.
13 Gay Street
New York, N.Y. 10014

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530

BRUCE ELLISON, ESQ.
Rapid City, South Dakota

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of June, 1987, at San Francisco, California.

CATHY NAKAMURA